Nos. 04-1507 & 04-1508

Supreme Court, U.S.
FILED
MAY 18 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JUDITH MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF AMERICAN SOCIETY OF NEWSPAPER EDITORS; BLOOMBERG NEWS; THE COPLEY PRESS, INC.; COX NEWSPAPERS, INC.; DAILY NEWS, L.P.; THE E.W. SCRIPPS COMPANY; FOX NEWS NETWORK, L.L.C.; KNIGHT RIDDER; THE MCCLATCHY COMPANY; THE MCGRAW-HILL COMPANIES, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSPAPER ASSOCIATION OF AMERICA; NEW YORK PRESS CLUB; NYP HOLDINGS, INC.; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS WITHOUT BORDERS; REUTERS AMERICA LLC; AND WHITE HOUSE CORRESPONDENTS' ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are eighteen newsgathering organizations, media organizations, and reporters' groups from across the country, many of which employ and represent thousands of reporters like the Petitioners in this case.[1] As members of the press, *amici* represent what this Court has called the "constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). *Amici* take this public responsibility seriously and thus have a strong interest in ensuring that the press retains its historic role as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965).

The press's ability to play its crucial role in our society depends in part on its capacity to gather valuable information from sources who demand assurances of anonymity. The Court of Appeals affirmed rulings holding journalists and a publisher in contempt of court for honoring promises to protect the identities of their confidential sources. That decision is in conflict with decisions from other circuits that recognize constitutional or common law privileges protecting reporters from compelled disclosure of confidential information. These inconsistent rulings create confusion

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[1] A complete list of *amici* is set out in the Appendix. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, contributed monetarily to the preparation or submission of this brief. *Amici* are filing this brief with the consent of the parties. Written consents are on file with the Clerk.

about the extent of protection afforded the newsgathering undertaken by *amici* on a daily basis. Moreover, the decision below, and other recent decisions like it, will chill relationships between *amici*'s reporters and their sources. *Amici* thus have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the petitions for certiorari have shown, these cases merit review because the circuits are in disarray in their interpretations of this Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and because circumstances requiring the assertion of the reporter's privilege have begun to arise with increasing – indeed alarming – frequency. Those factors alone provide sufficient grounds to grant review. But there are other considerations that underscore the need for the Court to grant certiorari.

The division among the circuits over whether and how the First Amendment protects journalists from forced disclosure of their confidential sources reflects an underlying inconsistency in the law. This Court's First Amendment jurisprudence, much of it developed since *Branzburg* was decided, includes cases taking two quite different approaches to the question whether the Constitution demands heightened scrutiny when facially neutral, generally applicable laws are being applied in a manner that will burden the exercise of First Amendment rights. On the one hand, in cases like *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court has stated that generally applicable laws unrelated to expression categorically do not create First Amendment issues, even when they are applied in a way that will burden expression. But in a wide variety of other cases, the Court has taken just the opposite approach, holding that generally applicable laws *do* require heightened scrutiny when they pose a genuine risk to First Amendment values.

A grant of review here would provide the Court with an opportunity to resolve this doctrinal tension. Moreover, as we show, it is possible to articulate workable standards that reconcile these seemingly inconsistent lines of cases. Where, as in *Cowles Media* and similar cases, the claim of burden on freedom of expression is facially unpersuasive, no heightened scrutiny of the application of general laws in particular cases is required. But where application of any law threatens to impose *real* burdens on free speech rights, the Court should apply heightened scrutiny under the First Amendment, as it has done many times in the past. Such an application of heightened scrutiny is particularly appropriate where a mechanism already exists for measuring the burdens the law imposes on First Amendment rights.

Under this approach, heightened First Amendment scrutiny should apply when journalists resist compelled revelation of their confidential sources. Forcing reporters to breach promises of confidentiality would seriously damage the press's newsgathering role, which in turn would deprive the citizenry of information of great public concern. Moreover, here there already exist procedural and judicial mechanisms that can accommodate the reporter's privilege, easing any concerns about workability. Independently, the same considerations would warrant recognition of a common law (but constitutionally infused) privilege. The Court should grant certiorari to resolve these pressing issues.

ARGUMENT

I. The Court Should Revisit *Branzburg*, Which Is Emblematic of an Important Doctrinal Tension Within the Court's First Amendment Jurisprudence Regarding Generally Applicable Laws.

Amici respectfully suggest that the important issues raised by press subpoenas and the reporter's privilege cannot be

adequately addressed simply by attempting to parse the precedential meaning of *Branzburg*'s majority opinion or Justice Powell's "enigmatic concurring opinion," 408 U.S. at 725 (Stewart, J., dissenting). Rather, the Court should focus on the more basic principles at issue here. Key to that undertaking is the question whether generally applicable laws that burden press and speech rights require a degree of heightened constitutional review. Federal Rule of Criminal Procedure 17, the law at issue here, is a neutral and generally applicable grant of authority for subpoenas in criminal cases. But application of that law to require disclosure of reporters' confidential sources can have a significant chilling effect on newsgathering, as the record in this case demonstrates. *See* Cooper/Time Pet. App. 123a-137a; Miller Pet. App. 108a-114a, 165a-179a, 207a-225a. This Court's First Amendment cases provide support both for applying heightened scrutiny in such a context as well as for withholding such scrutiny altogether.[2] That ambivalence, in fact, is reflected in *Branzburg* itself, where the Court seemed to come down on both sides of the doctrinal divide. The Court should grant review to remedy the confusion created by these two competing doctrinal strands.

1. On one side of the divide are cases like *Cowles Media*, which suggest that as a categorical matter, generally applicable laws raise no problems under the First Amendment. *See* 501 U.S. at 669 ("[G]enerally applicable

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[2] *See, e.g.*, David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U. L. Rev. 201, 201-02, 203 (1997) (stating that the cases are "in conflict" and send "mixed signals"); Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 Wm. & Mary L. Rev. 925, 939 (1998) (calling the doctrine in speech and press cases "confused"); Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 Const. Comment. 401, 402 (1995) ("Free speech doctrine is unclear [regarding whether] such incidental restrictions raise a First Amendment concern.").

laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). In concluding that a general law that "does not target or single out the press" does not trigger heightened constitutional scrutiny, *id.* at 670, the Court relied on cases applying general regulatory laws such as the Sherman Act and labor laws to press companies. *See id.* at 669-70. "[E]nforcement of such general laws against the press," the Court said, "is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670.

2. This categorical rejection of special scrutiny for generally applicable laws is, however, at odds with a wide variety of cases in which the Court has indicated that general applicability is not the end of the First Amendment inquiry. Indeed, this other set of cases *confirms* the need to weigh First Amendment concerns when applying general laws to the press. At least three areas of the Court's First Amendment jurisprudence reflect this other doctrinal strand:

a. First, the Court has recognized the need to balance First Amendment interests when considering the application of general laws that have the potential to disrupt the newsgathering process. In *Zurcher v. Stanford Daily*, for example, the Court confronted the question whether the First Amendment barred police from searching a newspaper office pursuant to an otherwise valid search warrant. 436 U.S. 547 (1978). Writing for a five-Justice majority, Justice White rejected a *per se* bar on such searches, but his opinion recognized that prior cases "insist that the courts apply the warrant requirements with particular exactitude *when First Amendment interests would be endangered.*" *Id.* at 565 (emphasis added); *see id.* at 564-65 (citing cases holding that ordinary procedures for obtaining search warrants are insufficient where the warrant seeks material protected by the

First Amendment, such as books). Further, the Court emphasized that magistrates should "guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper." *Id.* at 566. As in *Branzburg*, Justice Powell provided the decisive vote and explained that a balancing approach is required:

> As the Court's opinion makes clear, the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case . . . . [A] magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment . . . when he weighs such factors.

Id. at 570 (Powell, J., concurring) (citation omitted).[3]

To similar effect is *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), which involved, *inter alia*, a ban on visitors bringing cameras into a prison. The policy applied to all visitors, including the media, but the effect of the policy was to impose a burden on journalists' ability to report on prison conditions. No opinion garnered a majority, but Justice Stewart cast the deciding vote. He rejected the argument that the Court should ignore the burden imposed by such a general policy on the press's newsgathering role. To the

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[3] A year later, in *Herbert v. Lando*, the Court addressed the related question whether libel plaintiffs could conduct discovery into a press defendant's editorial processes. The Court declined to impose a *per se* bar but again warned that the rules of discovery should be "firmly applied" to protect the media from undue burdens. 441 U.S. 153, 177 (1979); *see also id.* at 178-79 (Powell, J., concurring) (explaining that a court "has a duty to consider First Amendment interests" and "when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated").

contrary, "the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public." *Id.* at 16 (Stewart, J., concurring). Therefore, the incidental burden on freedom of the press had to be considered:

> The Constitution requires sensitivity . . . to the special needs of the press in performing [its role] effectively. . . . [T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Id. at 17.

The Court has demanded similar sensitivity in other cases where general laws impinged on the press's ability to function. For example, the tort of intentional infliction of emotional distress is a neutral and generally applicable law that regulates many kinds of behavior, but it is nonetheless subject to First Amendment limits. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 52-56 (1988). To treat publications the same as other means of causing distress would threaten to undermine robust public debate. *Id.* at 53-56; *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 891, 911-15 (1982) (holding that state tort of malicious interference with business could not be applied to boycott that was protected by freedoms of speech and assembly).

b. Second, the Court has applied heightened scrutiny to laws of general applicability in its "expressive conduct" cases. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-67 (1991) (plurality opinion). The *O'Brien* line of cases involves situations in which a person is attempting to express something by engaging in conduct that is proscribed

for reasons other than its expressive potential – such as destroying a draft card or sleeping in a park (both of which can be part of a protest). *See O'Brien*, 391 U.S. at 376; *Clark*, 468 U.S. at 293. Although these cases involve laws of general applicability, the Court nevertheless has mandated heightened First Amendment scrutiny of their application to expressive conduct.

A general ban on public nudity, to take one recurring example, ostensibly applies to expressive and non-expressive conduct alike, but this Court has held that such a law's incidental burden on expressive nude dancing nonetheless triggers First Amendment scrutiny. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (plurality opinion of O'Connor, J.) (applying intermediate scrutiny even though the challenged ordinance was "a general prohibition on public nudity"); *id.* at 310 (Souter, J., concurring in part and dissenting in part); *id.* at 317 (Stevens, J., dissenting). The Court has declined to hold that, because of the generality of the ban, the incidental burden on expression "'is not subject to First Amendment scrutiny at all.'" *Id.* at 307-08 (Scalia, J., joined by Thomas, J., dissenting) (quoting *Barnes*, 501 U.S. at 572 (Scalia, J., concurring in the judgment)).

The Court has taken a similar approach in its "expressive association" cases, which require First Amendment scrutiny of generally applicable anti-discrimination laws. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Even though such laws regulate conduct that is typically non-expressive, the cases require stringent constitutional review approaching strict scrutiny when those general laws are applied in a manner that burdens an association's ability to engage in expression. *See Dale*, 530 U.S. at 648.

c. Third, in cases blending free speech and free exercise concerns, the Court has repeatedly held, before and

after *Branzburg*, that the general applicability of a law in no way prevents a constitutional violation. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating law against defacing license plates as applied to those who objected to the state's motto on moral and religious grounds); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (invalidating license tax on solicitation as applied to the dissemination of religious ideas); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating licensing scheme for those engaged in charitable and religious solicitations as applied to Jehovah's Witnesses). Indeed, *Murdock* specifically explained that the general applicability of the solicitation tax at issue there could not save it: "The fact that the ordinance is 'non-discriminatory' is immaterial. . . . A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike." 319 U.S. at 115.

Likewise, in *Wisconsin v. Yoder*, which invalidated a school attendance law as applied to the Amish, the Court directly rejected a general applicability test:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability* . . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it *unduly burdens* the free exercise of religion.

406 U.S. 205, 219-20 (1972) (emphasis added).

Yet here, too, this Court's decisions reflect some tension. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that the First Amendment was not implicated by a criminal law of general applicability (a law banning peyote) when it burdened religious practices. "[I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878. Four Justices rejected a categorical rule, saying "[t]here is nothing talismanic about neutral laws of general applicability." *Id.* at 901 (O'Connor, J., concurring in the judgment).

3. *Branzburg*, as noted, is emblematic of this doctrinal tension, which likely explains why the lower courts have divided over its meaning. Reaching toward one doctrinal strand, Justice White wrote that the First Amendment "does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." 408 U.S. at 682. At the same time, the opinion ultimately stopped short of ruling that general applicability is the end of the constitutional inquiry. Although the Court was unwilling to quash the press subpoenas "[o]n the records now before [it]," *id.* at 690, it also recognized that "news gathering is not without its First Amendment protections," that grand juries "must operate within the limits of the First Amendment as well as the Fifth," and that courts *should* quash press subpoenas in some cases, *id.* at 707-08. Justice Powell, who provided the pivotal fifth vote, read the majority opinion as mandating a case-by-case inquiry that strikes "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *See id.* at 709-10 (Powell, J., concurring). Under that reading, a court could exempt reporters from testifying on a case-by-case basis, based on the asserted First Amendment interest –

a view more in keeping with the line of cases that have subjected generally applicable laws to heightened scrutiny.

II. Properly Understood, the Court's Cases Reflect a Practical Approach Attuned to the Actual Burdens at Issue in Each Situation.

Amici suggest that the best way to make sense of and to reconcile these divergent opinions is to view them as reflecting a practical approach that responds to the actual burdens on First Amendment interests in each case. Where application of a general law imposes a burden on the press no greater than that imposed on any citizen, there is no need to apply heightened constitutional scrutiny. Where, however, there is a genuine threat to First Amendment values, the Court applies heightened First Amendment scrutiny even if the law is one of general applicability.[4] Secondarily, the Court also looks to whether the statutory or regulatory scheme has a built-in mechanism that can accommodate a particularized assessment of First Amendment concerns.

Cases like *Cowles Media*, in which the Court has made categorical pronouncements to the effect that generally applicable laws incidentally burdening the press do not trigger First Amendment scrutiny, are best understood as involving no real threat to the press's societal functions. *Cowles Media* itself was a civil suit against two newspapers brought by a source whose identity the newspapers had revealed after they had promised him confidentiality. The Court held that the First Amendment did not immunize the

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[4] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1210 (1996) (existing doctrine "treats substantial incidental burdens as raising a bona fide constitutional problem" but ignores insubstantial burdens); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 112 (1987) (concluding that "the Court will undertake first amendment review when an incidental restriction has a significant effect on free expression").

press from the doctrine of promissory estoppel. *Cowles Media*, 501 U.S. at 668-69. That is because application of that doctrine did not threaten newsgathering or First Amendment values. To the contrary, any restriction on the newspapers' ability to print truthful information about the informant resulted from a "self-imposed" promise. *Id.* at 671. And the press's ability to have promises of confidentiality regarded as credible clearly *aids* the newsgathering function. Rendering such promises legally unenforceable would only have impaired newsgathering.

Cowles Media fits into a line of cases holding that various regulatory laws apply to media businesses just as they apply to businesses generally. *Id.* at 669; *see, e.g.*, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-79 (1977) (copyright laws); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (Sherman Act); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (National Labor Relations Act). What should be clear from these cases is that none poses any real risk to First Amendment values. Requiring press enterprises to pay the minimum wage, for instance, has little to do with their reporters' ability to uncover government misdeeds, expose official action to public scrutiny, and so forth.

At the same time, this Court has also recognized that, as a practical matter, general applicability is not always a reliable indication that First Amendment values are safe. That is why, as the Court recognized in *Zurcher*, the caselaw "insist[s] that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered." 436 U.S. at 565. And it is also why the Court warned that the courts must "guard against searches of the type, scope, and intrusiveness that would *actually interfere* with the timely publication of a newspaper." *Id.* at

566 (emphasis added). Where there is a danger of "actually interfer[ing]" with freedom of the press, the Court has not been content to rely on general applicability.

Similarly, the Court's expressive conduct cases are premised on the fact that neutral laws targeting proscribable conduct can pose constitutionally relevant burdens on expression despite their generality. When a particular application of such a law creates that risk, the Constitution demands heightened scrutiny. *O'Brien*, 391 U.S. at 376-77 (law against damaging draft cards that impinged on war protests); *Clark*, 468 U.S. at 293-98 (ban on camping in parks that burdened demonstration for the homeless); *Pap's A.M.*, 529 U.S. at 289 (prohibition of public nudity that interfered with expressive dancing). As we show below, the claims of reporter's privilege at issue here fall into this category because there can be little doubt that the essential newsgathering function of the press will be compromised if reporters are routinely forced to reveal sources.

Another factor also helps to reconcile the Court's cases in this area. In assessing a First Amendment challenge to a generally applicable law, the Court has found it relevant whether some mechanism for weighing various burdens imposed by a particular enforcement of such a law already exists. The presence of a built-in mechanism that can readily accommodate consideration of First Amendment values in specific cases eases the practical difficulties of applying heightened scrutiny to a particular regulatory scheme.

For example, this factor helps to explain the different outcomes in cases like *Employment Division v. Smith* and *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Smith*, where the Court upheld application of a drug law that burdened religious practices, the Court discussed cases like *Sherbert*, which held that a state could not enforce its general rules governing unemployment benefits in a way that burdened

workers whose religion forbade work on Saturday. The Court distinguished *Sherbert* on the ground that it arose in "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 494 U.S. at 884.

The *Smith* Court expressed concern that writing a religious exemption into the legislature's categorical ban on peyote use would raise practical problems *See id.* at 885. But as the Court's treatment of *Sherbert* indicates, it believed that consideration of First Amendment concerns was more workable – and thus appropriate – where the regulatory scheme already contained a mechanism for considering the burdens imposed in particular cases. As *amici* show below, this principle is relevant to the reporter's privilege because here too there already exist procedural mechanisms for quashing unduly burdensome subpoenas and discovery requests, ameliorating worries about administrability.

III. The Court Should Grant Certiorari and Enforce a First Amendment Privilege or a Comparable Common Law Privilege.

Under a rule that requires heightened scrutiny when a given application of a general law is likely to burden First Amendment rights, a subpoena seeking the identity of a confidential source would require heightened scrutiny. Compelled disclosure of confidential sources threatens the vigorous and independent press that the Framers knew was crucial to effective self-government. Moreover, the privilege can be applied without undue practical difficulties.

A subpoena demanding revelation of confidential sources poses a fundamentally different situation from cases of the *Cowles Media* variety, which involve the application of

general business and regulatory laws to press enterprises. In the *Cowles Media* line of cases, there is no serious threat to the press's journalistic functioning. (Indeed in *Cowles Media* the application of general business laws arguably *aided* the press by promoting confidential communications between sources and reporters.) Unlike labor laws, general taxes, and antitrust laws, press subpoenas put First Amendment values at risk and impose constitutionally compelling burdens.

As a threshold matter, the Court has on multiple occasions recognized that the First Amendment protects the process of gathering the news as well as publishing it. *Branzburg* itself explicitly stated that the First Amendment requires "protection for seeking out the news." *Branzburg*, 408 U.S. at 681. Protection of the newsgathering process is necessary for the common-sense reason that the press can only report what it is able to learn. As the Court emphasized in a case vindicating the press's right of access to a trial, "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980) (plurality opinion of Burger, C.J.);[5] *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (observing that the "First Amendment guarantees of a free press" forbid governmental regulation of the "crucial" editorial process).

There can be no doubt that the constitutional protection for "seeking out the news" encompasses interviewing sources, including confidential ones. *See Branzburg*, 408 U.S. at 709 (Powell, J., concurring) (explaining that under the majority opinion, journalists retain "constitutional rights

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[5] Although no opinion garnered a majority in *Richmond Newspapers*, seven of the eight participating Justices agreed that the First Amendment provided a right of access to the trial.

with respect to the *gathering of news or in safeguarding their sources*" (emphasis added)). Journalists frequently depend on confidential sources to gather news, and this is especially true with regard to the most valuable investigative stories. *See, e.g.*, John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57, 74 (1985) (reporting that confidential sources played "a significant role" in two-thirds of the stories nominated for Pulitzer Prizes). A press that can only reprint government statements would fail to play its important constitutional role of "keeping officials elected by the people responsible to all the people whom they were selected to serve," *Mills*, 384 U.S. at 219; *cf. Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) ("A free press cannot be made to rely solely upon the sufferance of government to supply it with information.").

Forced disclosure of confidential sources substantially hampers the protected activity of newsgathering. Justice White's majority opinion in *Branzburg* admitted that press subpoenas could lead to "consequential" burdens on newsgathering 408 U.S. at 690. And since the time of *Branzburg*, many courts have agreed with Justice Stewart's common-sense assessment that, without the protections of a reporter's privilege, "sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it," *id.* at 731 (Stewart, J., dissenting); *see, e.g.*, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (concluding that forced revelation of confidential sources "may significantly interfere with [the media's] news gathering ability"). In the district court, Petitioners submitted affidavits from themselves and prominent historians and journalists detailing the ways in which forced disclosure of confidential sources would harm their ability to inform the public on matters of great societal concern. Cooper/Time Pet. App. 123a-137a; Miller Pet. App. 108a-

114a, 165a-179a, 207a-225a. That compelled disclosure raises serious concerns is further evidenced by the judgment of the forty-nine states (plus the District of Columbia) that recognize some form of a reporter's privilege. *See* Miller Pet. App. 50a (Tatel, J., concurring in the judgment).

Recognizing a constitutionally based reporter's privilege coheres with recent trends in this Court's jurisprudence. Increasingly, the Court has begun to take a practical approach that applies varying degrees of heightened scrutiny in other contexts that – like this one – have important constitutional interests on both sides of the equation. For example, in *Turner Broadcasting System, Inc. v. FCC*, the Court invoked *O'Brien* to analyze the constitutionality of rules requiring cable systems to carry local broadcast channels. 512 U.S. 622, 662 (1994). These "must carry" rules raised First Amendment concerns because they required the transmission of certain signals, but the rules were also justified on the ground that they fostered free, over-the-air programming and promoted the multiplicity of viewpoints that is "central to the First Amendment." *Id.* at 662-64. Similarly, in *Bartnicki v. Vopper*, the Court was called upon to weigh the First Amendment value of illegally intercepted telephone calls against the privacy interests that the wiretap law promoted. 532 U.S. 514, 532-35 (2001). In neither case did the Court ignore the constitutional values on one side; rather, the Court took a practical approach attuned to the actual burdens involved. *See also Denver Area Educ. Telecomms. Consort., Inc. v. FCC*, 518 U.S. 727, 740-41 (1996) (plurality opinion) (explaining that the Court applies its First Amendment analysis in light of "the balance of competing interests and the special circumstances of each field of application"); *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring) ("Given these competing interests on both sides of the equation, the key question becomes one of proper fit." (internal quotation marks omitted)). The same should be true here, because "the

invocation of grand jury interests is not some talisman that dissolves all constitutional protections." *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (internal quotation marks omitted).

As noted above, the Court has found it especially appropriate to subject generally applicable laws to First Amendment scrutiny when there already exists a procedural mechanism that would ease concerns about administrability. *See supra* p. 13-14. Here such a mechanism exists in the form of federal procedural rules that protect parties from unduly burdensome subpoenas and other discovery demands. *See* Fed. R. Crim. P. 17(c)(2) (permitting court to quash criminal subpoenas "if compliance would be unreasonable or oppressive"); Fed. R. Civ. P. 45(c)(3) (permitting court to quash or modify "undu[ly] burden[some]" civil subpoenas); Fed. R. Civ. P. 26(b)(2), (c) (permitting the court to grant relief from unduly burdensome discovery requests). Because these procedures already exist, the courts would not find (and have not found) great difficulty in considering First Amendment concerns along with the myriad other factors that are already being considered. Indeed, given the breadth of the considerations that can justify a restriction on discovery in the name of undue burden,[6] it would be anomalous if the First Amendment could *not* be considered when other types of arguably less significant burdens regularly are considered. As the Court stated in *Smith*, it would be improper to exclude interests protected by the First Amendment from the calculus. 494 U.S. at 884 ("[W]here

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[6] *See* 2 Charles Alan Wright, *Federal Practice and Procedure* § 275, at 262 n.25 (3d ed. 2000) (citing a sampling of cases demonstrating the variety of circumstances that can justify relief under Federal Rule of Criminal Procedure 17(c)(2)); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459, at 47-48 & n.32 (2d ed. 1995) (illustrating the "wide variety of factual contexts" that justify quashing a subpoena under Federal Rule of Civil Procedure 45(c)).

the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."); *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) (where ordinance barring killing animals contained various exceptions for "necessary" killings, religious reasons for killing animals could not be disregarded).

Further demonstrating that the reporter's privilege is readily administrable, the last thirty years have shown that the *Branzburg* majority overestimated the "practical and conceptual difficulties" involved in "defin[ing] those categories of newsmen who qualif[y] for the privilege," 408 U.S. at 704. Because most federal courts have recognized the reporter's privilege at least in some contexts, they have developed experience and expertise in dealing with such questions.[7] The tests they have employed are no less workable than other familiar inquiries such as, for example, whether material was produced in anticipation of litigation so as to qualify as protected work product. The lower courts have shown themselves more than equal to the task of administering the privilege.

Finally, even if the First Amendment did not of its own force require the reporter's privilege, the underlying constitutional concerns, and other reasons of sound policy, would support the privilege as a matter of federal common

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[7] *See, e.g., In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (holding that the privilege is applicable to persons who are "engaged in investigative reporting, gathering news, and [who] have the intent at the beginning of the news-gathering process to disseminate this information to the public"); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (holding that "the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process").

law. In federal question cases, the courts are authorized "to define new privileges by interpreting 'common law principles . . . in light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (quoting Fed. R. Evid. 501; alteration in original). *Branzburg* did not and could not consider the distinct authority conferred under Rule 501, which was enacted several years after *Branzburg* was decided.[8] Because *Branzburg*'s analysis concerned the First Amendment, debates over the status of the reporter's privilege have largely played out as a matter of constitutional law. But many of the same principles that require heightened scrutiny of press subpoenas under the Constitution support recognition of a common law reporter's privilege. The press plays an "essential role in our democracy," *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring), and the "free flow of information to the people" concerning the conduct of their public officials is of "*paramount* public interest." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (emphasis added). Surely this interest is at least as important as the public interest that justified the psychotherapist privilege in *Jaffee*, 518 U.S. at 11. The recognition of a reporter's privilege in forty-nine states and the District of Columbia, moreover, strongly supports the adoption of a similar federal privilege. Resolving the split in the lower federal courts by enforcing a common law privilege provides an independent reason for granting review.

CONCLUSION

The petitions for certiorari should be granted.

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[8] Even if *Branzburg* were controlling on the common law question, *see* Miller Pet. App. 22a-24a (Sentelle, J., concurring), that conclusion should be reconsidered based on the developments in First Amendment law described herein and the developments with regard to state law and the federal law of privileges discussed in the petitions.

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May 18, 2005